IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD GREENE	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA,	:	
PHILADELPHIA POLICE COMMISSIONER	:	
RICHARD NEAL, in his individual capacity,	:	
PHILADELPHIA POLICE COMMISSIONER	:	
JOHN F. TIMONEY, in his official capacity[1]	:	
DETECTIVE RICHARD PRENDERGAST, and	:	
DETECTIVE CHARLES KWISZ	:	NO. 97-4264

Yohn, J. May , 1998

MEMORANDUM AND ORDER

Plaintiff Edward Greene ("Greene") brings this § 1983 civil rights action stemming from his arrest for a robbery committed on February 17, 1995. Defs.' Mot. for Summ. J. Ex. B, Incident Report (Defs.' Mot. Ex. B). The arrest warrant issued primarily on the basis of an eyewitness identification of Greene by one of the victims, Jose Fuentes ("Fuentes"). Id. Ex. J., Affidavit of Probable Cause (Defs.' Mot. Ex. J). Several months later, on the day of Greene's trial, Fuentes recanted his identification and all charges against Greene were dropped. Id. Ex. C, Fuentes Dep. at 7 (Defs.' Mot. Ex. C). In the instant lawsuit, Greene accuses the defendants City of Philadelphia,

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[1] John F. Timoney was sworn in as Commissioner of the Philadelphia Police Department in February, 1998. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John F. Timoney is substituted for former acting Commissioner Richard Neal, but only to the extent that Commissioner Neal has been sued in his official capacity. Thus, the court acknowledges that the plaintiffs still attempt to maintain an action against Commissioner Neal in his individual capacity.

Police Commissioner Neal in his official and individual capacities, Detective Richard Prendergast, and Detective Charles Kwisz of violating his Fourth, Fifth, and Fourteenth Amendment rights. See Amended Compl. ¶ 1. After discovery closed, defendants filed a motion for summary judgment requesting the court to grant judgment in favor of all defendants on all of plaintiff's claims. For the reasons that follow, I will grant the defendants' motion.

SUMMARY JUDGMENT STANDARD

Rule 56 provides that summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment may meet its burden with a showing "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The court must draw all reasonable inferences in the nonmovant's favor, and "the evidence of the nonmovant is to be believed." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant must do more than rest upon mere allegations, general denials, or vague statements, Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884 (3d Cir.1992), and instead "must present affirmative evidence to defeat a properly supported motion for summary judgment," Anderson, 477 U.S. at 257. No genuine issue for trial exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita Elec. Indus. Co.

v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

BACKGROUND

On February 17, 1995, Fuentes and Amodei were robbed at gun point by two males. Defs.' Mot. Ex. B. Immediately following the robbery, Fuentes described the two assailants to the responding police officers, not Detective Prendergast or Detective Kwisz, as (1) a Hispanic male, age 17-18 and, (2) a black male, age 19. Id. Ex. B.[2] The parties have not stated whether or not Amodei provided a description of the perpetrators at this time.

Two days after the robbery, Detective Mangold, the police officer assigned to the investigation, interviewed Fuentes again. Id. Ex. E, Investigation Report (Defs.' Mot. Ex. E). This time, Fuentes supplemented his description of the perpetrators, describing them as two "B/Ms [black males] 19-20 yrs, **5'8"**, 150 lbs., both wearing dark clothes." Id. (emphasis added).

Detective Mangold thereafter approached Detective Prendergast, who has been on the police force for approximately 16 years, about the case. Id. Ex. A at 26. There

[2] There is no record evidence that Fuentes' description of the black male assailant, the individual later presumed to be Greene, as approximately 5'8" or "a little shorter" than Fuentes, who is 5'9", was actually communicated to Detectives Prendergast or Kwisz prior to Greene's trial. See id. Ex. A, Prendergast Dep. at 32-33 (Defs.' Mot. Ex. A) (Prendergast testified that Fuentes did not tell him that the perpetrators were around 6'0' or shorter until Greene's actual trial); Ex. C, Fuentes' Dep. at 14 (Defs.' Mot. Ex. C) (Fuentes testified that although he thought Greene was slightly too tall to be the perpetrator at the preliminary hearing Fuentes did not tell anyone of his suspicions); Ex. E, Investigation Report, (Def.'s Mot. Ex. E) (investigation report states that Officer Kelly took the initial report of the robbery); Ex. N, Kwisz Dep. at 8-9 (Kwisz testifies that he did not interview the victims nor read their statements at any time) (Defs.' Mot. Ex. N).

is no record evidence that Detective Mangold informed Detective Prendergast that Fuentes described Greene as 5'8". Id. Rather, Detective Prendergast testified that Detective Mangold suggested that William Greene, the plaintiff's brother, may have been involved in the robbery. Id. Detective Prendergast checked the computer and found that William Greene was in custody at the time of the alleged robbery. Id. Detective Prendergast, however, knew that William's brother, the plaintiff, had a previous arrest for robbery and lived within two blocks of the site of the February 17th robbery. Id. 26-27. Furthermore, Detective Mangold informed Detective Prendergast that the assailants fled in the direction of the plaintiff's home. Id. at 26-27, 30. Based on this information, Detective Prendergast determined that Greene was a suspect in the robbery. Id.

To test his suspicions, Detective Prendergast arranged a photo array of eight photos, a spread which included a photo of Greene. On April 17, 1995, he showed the photo spread to Fuentes and Amodei. Id. Ex. J, Affidavit of Probable Cause (Defs.' Mot. Ex. J). Fuentes positively identified Greene as one of the individuals who robbed him. Id. Ex. J.

Before he showed the photo array to Amodei, Detective Prendergast interviewed him regarding the robbery. Id. Ex. A, at 28-29. Amodei stated that two individuals assaulted and robbed him and Fuentes, and described one of the perpetrators as a dark-complected black male, who was approximately six feet tall. Id. When Detective Prendergast showed Amodei the photo spread, however, Amodei was not able to make

a positive identification. Id.

Based on Fuentes' identification of Greene, Detective Prendergast prepared an affidavit of probable cause for Greene's arrest for the February 17th robbery. The affidavit cited the facts of the robbery, stating that on February 17, 1995 "a b/m 6' dk compl., . . . , and an h/m lt compl" approached the complainants and robbed them at gunpoint. Id. Ex. J. The affidavit also provided that "[o]n 4-17-954 6:55PM the [complainant] JOSE FUENTES was shown a [sic] 8 photo spread containing a photo of the above-listed SUBJECT [Greene] . . . and FUENTES ID'd the SUBJECT as the b/m who robbed him." The affidavit further stated that on the same date, "the [complainant] GUILIANO AMODEI was shown the same photo spread and could not make a positive ID." Id.[3]

The affidavit of probable cause was approved by an Assistant District Attorney and the issuing authority, Bail Commissioner Rebstock. Id. Ex. J; Id. Ex. K, Affidavit of

[3] The plaintiff contends, however, that Detective Prendergast was aware of a significant height differential between the victim's descriptions of Greene and his actual height, 6'5". Pl.'s Mem. Opp. Defs.' Mot. Summ. J. Ex. A at 6 (Pl.'s Mem.). The plaintiff points to two brief encounters between Detective Prendergast and Greene as the basis for Greene's alleged knowledge of this significant height differential. Detective Prendergast initially met Greene in 1994 while investigatng a robbery. The detective testified that he did not form an impression of Greene's height at this time, especially because the detective was seated in his squad car during the entire encounter, making it more difficult to gauge Greene's height. Defs.' Mem. Ex. A at 9-12, 72.

The second alleged encounter occurred at Greene's residence in 1995. However, the plaintiff has introduced absolutely no evidence that Detective Prendergast made a specific observation regarding Greene's height, outside of remarking that Greene was "tall." Defs'. Mem. at 12-13.

Probable Cause approved by ADA (Defs.' Mot. Ex. K).[4] Based upon the affidavit, Rebstock signed and issued a warrant for Greene's arrest. Id. Ex. L, Arrest Warrant (Defs.' Mot. Ex. L).[5] Pursuant to this warrant, Detective Prendergast, accompanied by Detective Kwisz, arrested Greene on June 26, 1995. Id. Ex. M, Arrest Report (Defs.' Mot. Ex. M). Assisting Detective Prendergast in serving Greene's arrest warrant was the extent of Detective Kwisz's involvement in Greene's investigation. Id. Ex. N, Kwisz Dep. at 8-9, 12 (Defs.' Mot. Ex. N).

At Greene's preliminary hearing, Fuentes noted that Greene appeared "just a little bit too tall" to be the person who robbed him but he did not tell this observation to anyone. Id. Ex. C. at 13-14. Greene, on the other hand, claims that he was in a wheelchair at the preliminary hearing due to a basketball injury, thereby preventing Fuentes from observing his actual height. Defs.' Mot. Ex. F, Greene's Dep. At 52 (Defs.' Mot. Ex. F). While this may be so, as will be explained, this fact is not pertinent to the issues at hand.

After the preliminary hearing, Greene was incarcerated for a period of three months while awaiting trial, which took place in September, 1995. Amended Compl. ¶ 19. At the trial, Fuentes informed the Assistant District Attorney that Greene did not

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[4] Rule 119(a) of the Pennsylvania Rules of Criminal Procedure provides that an arrest warrant will issue only if sworn to before an issuing authority. There is no contention in this case that Bail Commissioner Rebstock is not an "issuing authority" within the meaning of the rule.

[5] On the day of his arrest, Green recorded his height as 6'3". Id. Ex. N, Biographical Information Report; Ex. A at 60.

look like the person who robbed him because he was too tall to be the perpetrator. Defs' Mot. Ex. C. at 16-18; Ex. F. at 73.

Because Fuentes recanted, the charges against Greene relating to the February 17th robbery were dismissed. On June 25, 1997 Greene filed the instant law suit, pursuant to 42 U.S.C. § 1983. He filed an amended complaint on September 29, 1997, in which he alleged that defendants City of Philadelphia, Philadelphia Police Commissioner Richard Neal, Detective Richard Prendergast, and Detective Charles Kwisz violated his right "to be free from illegal searches and seizure of his person and [his] right to be free from unlawful arrest, detention, and imprisonment, said rights secured to plaintiff by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. § 1983." Amended Compl. ¶ 25. After discovery closed on December 14, 1997, pursuant to the parties' stipulation and court order, the defendants filed the instant motion for summary judgment. Greene v. City of Philadelphia, No. 97-4264 (E.D. Pa. Aug. 15, 1997) (order granting parties' stipulation to close discovery on December 14, 1997). The motion requests that the court enter judgment in favor of all defendants on the grounds that the plaintiff has failed to show that (1) the defendants violated a protected right under § 1983, (2) as to the municipal defendants, the violation of the plaintiff's federally protected rights stemmed from a municipal custom or policy and, (3) the individual defendants are entitled to qualified immunity.

DISCUSSION

Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. To assert a successful claim under the statute, the plaintiff must show that (1) the act was performed by a person acting under color of state law, and (2) the conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or federal law. Parratt v. Taylor, 451 U.S. 527, 535 (1981). The defendants argue that the plaintiff failed to show that the defendants deprived him of § 1983's second requirement - that the defendants' conduct deprived the plaintiff of a right, privilege or immunity secured by federal law.

In his complaint, the plaintiff asserts that the defendants violated his "right to be free from illegal searches and seizures of his person and [his] right to be free from unlawful arrest, detention and imprisonment" as protected by the Fourth, Fifth and Fourteenth Amendments. Amended Compl. ¶ 25. As adduced from the facts introduced thus far, Greene's specific claims are that the defendants violated his constitutional rights by (1) executing a suggestive photo array, (2) improperly manipulating the affidavit of probable cause in order to secure an arrest warrant and (3) arresting him without probable cause.

I. Suggestive Identification

Although not argued with complete clarity, Greene seems to contend that the

manner in which Fuentes identified him was unduly suggestive. Specifically, the plaintiff contests Detective Prendergast's inclusion of Greene's photo in the array even though the detective knew Greene was "tall" and that both victims described their assailants as 6'0" or less.[6]

Identification procedures are generally found to be violative of a defendant's constitutional rights if the process used was "unnecessarily suggestive" and "created a substantial risk of misidentification." Roberts v. Toal, No. CIV.A. 94-0608, 1997 WL 83748, *6 (E.D. Pa. Feb. 20, 1997), aff'd, 133 F.3d 910 (3d. Cir. 1997), (quoting United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995). A defendant arguing "suggestiveness of unconstitutional dimensions bears the initial burden of showing that some action was taken during the confrontation which singled out the defendant." Reese v. Fulcomer, 946 F.2d 247, 259 (3d Cir. 1991), cert. denied, 503 U.S. 988 (1992). The suggestiveness of a photographic identification ultimately depends on the size of the array, the manner of presentation and its contents. Roberts, 1997 WL 83748, at *6.

There is no record evidence that Detective Prendergast was suggestive or encouraged Fuentes to identify any particular individual within the photo array as the perpetrator. In his deposition, Fuentes testified that the detectives came to his house

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[6] The plaintiff's complaint states that "[a]lthough Amodei did not identify anyone in he photo array, it somehow developed that victim Fuentes identified Edward Greene." Amended Compl. ¶ 16. In his response memorandum to the defendants' motion for summary judgment he claims "Prendergast had actual knowledge that Edward Greene was tall . . . , and had actual knowledge that Fuentes and Amodei had both described the perpetrators as being 6' or less." Pl.'s Mem. at 1-2.

to present him with the photo array and the following transaction occurred:

> A. He [the police officer] told me to take as long as I can. He didn't rush me. He didn't say is this the guy, nothing like that. I picked Mr. Greene out because I thought it was him.
>
> . . . .
>
> Q. When you say he did not rush you, he didn't say is this the guy, do you mean that he didn't make any suggestive comments to you about who you should pick out?
> A. No, he did not.
> Q. Did this detective ask you questions about the robbery or the description of the person?
> A. No, he did not. He just told me I have these lineups. I just want you to look carefully and take your time and is this one of the guys. That's all he said. When I seen the picture I thought that was him.
> Q. At that time you were pretty confident that was him?
> A. Yes.

Defs.' Mot. Ex. C, at 11-12.

Additionally, there is no evidence that the array itself was suggestive. The array included eight photos, one of which was of Greene. The parties only evidence of the physical characteristics of the other individuals in the accompanying composites is that Detective Prendergast selected the seven other composites "in order to show a fair display of facial characteristics." Id. Ex. A at 26. Nor has the plaintiff challenged the size of the array. As such, the plaintiff has not shown that the array itself was suggestive because of its size or its failure to include photos of physically similar individuals. Compare, Roberts v. Toal, 1997 WL 83748, *6 (E.D. Pa. Feb. 20, 1997) (parties provided the court with the physical characteristics of the other individuals in the 44 photos comprising the array).

II. Affidavit of Probable Cause

Like the plaintiff's challenge to the identification procedures, Greene's dispute regarding the validity of the affidavit of probable cause is something less than precise. Nevertheless, it appears that Greene essentially charges Detectives Prendergast and Kwisz with knowingly manipulating the affidavit of probable cause in order to secure Greene's arrest warrant. Pl.'s Mem. at 6.

Pennsylvania comports with the requirements of the Fourth Amendment by mandating that an arrest warrant shall be granted only if supported by an affidavit of probable cause to arrest.[7] PA. R. CRIM. P. 119(a). A plaintiff challenging the validity of a warrant based on the underlying affidavit of probable cause "must prove by a preponderance of the evidence that, (1) the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) such statements or omissions are material, or necessary, to the finding of probable cause." Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). Proof of negligence or innocent mistake in preparing the affidavit is insufficient to establish liability. Lippay v. Christos, 996 F.2d 1490, 1501 (3d Cir.1993) (citation omitted). Rather, reckless disregard for the truth requires that the affiant

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[7] Rule 119(a) provides, in relevant part:

> No arrest warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority.

PA. R. CRIM. P. 119(a).

made the statements in the affidavits "with [a] high degree of awareness of their probable falsity." Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

Greene has not provided any evidence that the defendants intentionally or with reckless disregard inserted false statements in the affidavit of probable cause. He appears to contend that Detective Prendergast not only knew that the assailants were both described as 5'8", but also recorded the height of the black male assailant as 6'0" in the affidavit of probable cause. Pl.'s Mem. at 6. Neither the authority Greene relies on for that assertion nor any of the other evidence submitted in connection with this motion supports that proposition. Rather, in Fuentes' statement to Greene's attorney he states that he told the **responding police officers** at the initial investigation on February 19, 1995, that the assailants were both approximately 5'8" or **a little bit taller than he is**. Id. Ex. D at 2 (emphasis supplied). It is undisputed that Detective Prendergast was not one of the responding officers and did not participate in the initial investigation. Id. Ex. B, Ex. C at 10 & E. Furthermore, Detective Prendergast testified that he was not aware that Fuentes' initial report described the black male assailant as 5'8". Id. Ex. A. at 53. Outside of this evidence, Greene provides nothing but mere speculation that Detective Prendergast knew that the assailants were described as 5'8". To successfully defend a summary judgment motion the nonmovant must do more than rest upon unsupported allegations or vague speculations. See Trap Indus., Inc. v. Local, 825, 982 F.2d 884 (3d Cir. 1992).

The plaintiff's second assault on the validity of the affidavit seems to be that

Detective Prendergast omitted material information from the document. "[W]here an omission, rather than an affirmative misrepresentation, is the basis for a challenge to the affidavit, a court should ask whether the affidavit would have provided probable cause if it had contained a disclosure of the omitted information." Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). In other words, the court adds the allegedly omitted facts to the affidavit and then evaluates if a genuine issue of material fact exists as to whether the omissions would be critical to a probable cause determination. Id. at 400.[8]

Specifically, the plaintiff insinuates that Detective Prendergast intentionally failed to include several critical facts in the affidavit for probable cause. First, Greene argues that Detective Prendergast's failure to include the fact that the crime occurred on a dimly lit street amounted to a material omission because it impugned Fuentes' ability to make a proper identification. Amended Compl. ¶ 12. The court would first note that the affidavit did include the time and location of the robbery, 9:20 PM, allowing the issuing authority to infer that the viewing conditions might have been less than desirable. Defs.' Mot. Exs. J & K. Furthermore, the only evidence regarding lighting conditions at the time of the robbery is that the location of robbery "was not a dimly lit street" but is "illuminated with street lights overhead." Id. Ex. A at 39-40. Finally, in

[8] In Franks v. Delaware, 438 U.S. 154, 171-72 (1978), the Supreme Court held that to successfully impugn an affidavit of probable cause the defendant must show that the affidavit, purged of all intentional falsities, would not be sufficient to support a finding of probable cause. Extending this reasoning, lower courts have found that material omissions, as well as affirmative misrepresentations, in a warrant application may also fail to meet the probable cause requirement. Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). Furthermore, the circuit courts have extended the Franks affidavit challenges to § 1983 actions. Id.

direct contrast to the assertion that the failure to include allegedly deficient lighting conditions in the affidavit undermined the reliability of the identification, Fuentes testified that he had a good opportunity to view his assailant. Id. Ex. C at 8-9. The uncontroverted evidence shows that Fuentes noticed the assailants crossing the street toward him, that one of the assailants asked him the time, that the black male assailant was face-to-face with him during the robbery and that this gave Fuentes a good opportunity to view him. Id. See Roberts v. Toal, 1997 WL 83748, *9 (E.D. Pa. 1997), aff'd, 113 F.3d 910 (3d Cir. 1997) (where victim testified that she had a good opportunity to view her attacker, was within a few feet of him, the victim's identification was valid even though the lighting was poor, her attacker walked behind her prior to the attack, and wore a baseball cap that covered his face).

The plaintiff also argues that there is a material question of fact surrounding the issue of whether Detective Prendergast purposefully ignored the significant height differential between Greene and Fuentes' initial description. Pl.'s Mem. at 6. First, Greene has not presented any evidence that Detective Prendergast knew that Fuentes' initial description of the perpetrator to be 5'8".[9] Secondly, Greene has not provided any evidence that Detective Prendergast knew there was a significant height differential between Greene and Fuentes' description. The plaintiff hinges this argument on a brief 1994 encounter between Detective Prendergast and Greene in which the detective may have noticed that Greene was "tall." Defs.' Mot. Ex. A at 9-11. In fact, Greene has not

[9] See supra, pp. 12-13.

presented a shred of evidence that Detective Prendergast knew Greene was 6'5".

But even assuming Greene had met his evidentiary burden on these contested issues, the court still finds that the uncontested portions of the affidavit, excluding the allegedly false information and including the allegedly omitted information, warrant a finding of probable cause. As stated, a plaintiff challenging the validity of an affidavit of probable cause must not only prove that the defendants intentionally made false statements but must also show that "such statements or omissions are material, or necessary, to the finding of probable cause." Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997).

The principle that probable cause may be based on a single and reasonably reliable eyewitness identification, even though the identification may be tarnished by discrepancies in the witnesses' description of the perpetrator, is well-established. Lallemand v. University of Rhode Island, 9 F.3d 214, 216 (1st Cir. 1993), is particularly on point. There, the victim, who was the sole witness to the crime, initially described her assailant to Officer McDonald ("McDonald") as 6'0", with feathered brown hair, named "Dan," who lived in her dormitory. Id. at 214. Two days later, the victim positively identified the plaintiff, an individual who was not named Dan, who was 6'7", and neither lived in her dormitory nor had feathered-brown hair, as her assailant. Id. McDonald secured an arrest warrant for the plaintiff based on this photo identification. Id. When the plaintiff later challenged the warrant based on the considerable discrepancies between the victim's initial description and his actual appearance, the

court held that "[t]he discrepancies concerning the assailant's first name, hair style, dormitory and height are trivial, given their nature and the positive identification of Lallemand by Eckman." Id. at 217. Thus, the court found that the undisputed facts, i.e., the identification, show that probable cause actually existed. Id.; see also Barnes v. Dorsey, 480 F.2d 1057, 1061 (8th Cir. 1973) (victim's report of crime gave arresting officers probable cause); Roberts v. Toal, No. CIV.A. 94-0608, 1997 WL 83748 (E.D. Pa. Feb. 20, 1997), aff'd, 113 F.3d 910 (3d Cir. 1997); Patterson v. City of Phila., No. CIV.A. 95-367, 1995 WL 708130, *3 (E.D. Pa. Nov. 21, 1995) (probable cause found and summary judgment granted based on uncontested portion of affidavit indicating that witness made photo identification of plaintiff).

Furthermore, when examining whether the determination that a person should be charged with a crime is reasonable, the reliability of the informant or witness who provides the information is a relevant factor. Roberts v. Toal, 1997 WL 83748, *11 (E.D. Pa. Feb. 20, 1997), aff'd, 133 F.3d 910 (3d Cir. 1997); see also Grimm v. Churchill, 932 F.2d 674, 675-76 (7th Cir. 1991) ("when an officer has 'received his information from some person--normally the putative victim or an eye witness--who it seems reasonable to believe is telling the truth,' he has probable cause"). Indeed, when information comes from a victim or witness to a crime, rather than an interested informant, there exists a presumption that the information "carries with it an indicia of reliability." See United States v. Burke, 517 F.2d 377, 380 (2nd Cir. 1975); United States v. Unger, 469 F.2d 1283 (7th Cir. 1972) cert. denied, 411 U.S. 920 (1973);

WAYNE LAFAVE, SEARCH AND SEIZURE § 3.4(a), at 717-18. (2nd ed. 1987).

Specifically, the critical fact in the affidavit at hand is that Fuentes, who was one of the victims and eyewitnesses to the crime, positively identified Greene as one of the individuals who robbed him, Defs.' Mot. Ex. A at 31, 70-71, Ex. C at 11-12, Ex. D at 3. Greene has not produced any evidence to dispute this. Additionally, there is no evidence that the detectives should have questioned the reliability of Fuentes. The plaintiff's attempt to make a constitutional issue out of the fact that Fuentes' described the black male assailant initially as 5'8" and, **a year later**, at his deposition, as 6'0" borders on ludicrous.[10] Pl.'s Mot. at 6. Furthermore, Fuentes' description of the perpetrators was largely supported by Amodei, the other victim of the crime. At the photo array, Amodei described the black male perpetrator as 5'11"-6'0" and wearing a big, three-quarter length black coat. Defs.' Mot. Ex. A at 28. This description is largely

[10] Moreover, the plaintiff claims that there is a material issue of fact as to whether or not Greene was in a wheel chair at the preliminary hearing which would have prevented Fuentes from assessing his height. Granting that whether Greene was in a wheelchair at the preliminary hearing is contested, it is difficult to discern exactly why this issue is material. See FED. R. CIV. P. 56(C)(plaintiff must show that there is a genuine issue of material fact to overcome summary judgment motion). Apparently, Greene contends that he was in a wheelchair at the preliminary hearing, Defs.' Mot. Ex. C at 32-33, thereby making it impossible for Fuentes to gauge his height and obligating Detective Prendergast to apprise him of the height differential. Pl.'s Mem. at 5. But, as already shown, there is no evidence that Detective Prendergast was aware of the height differential either. Thus, if Greene was in a wheelchair Detective Prendergast, like Fuentes, would not be aware of the significant height differential and, therefore, would not be obligated to inform Fuentes or the authorities. On the other hand, if Greene was not in a wheelchair at the preliminary hearing, as Fuentes contends, Fuentes would have had as adequate an opportunity to view Greene's height as Detective Prendergast, relieving the detective of the responsibility of pointing out the alleged discrepancy. Defs.' Mot. Ex. C. at 13-14.

consistent with that given by Fuentes. Id. Exs. B & D.

In sum, the plaintiff has not shown any reason for Detective Prendergast to suspect that Greene was not the assailant. To find otherwise "would make it a violation of one's constitutional rights if law enforcement officials did not affirmatively seek out every possible theory that could undermine a positive identification, . . . , in order to rely upon an identification." Roberts v. Toal, 1997 WL 83748, *12 (E.D. Pa. Feb 20, 1997), aff'd. No. 97-1136 (3d Cir. March 4, 1998). Probable cause does not require this.

Finally, in his response memorandum the plaintiff declares that he plans to conduct more discovery although the discovery deadline has passed. Pl.'s Mem. at 4, 10. The court already extended discovery by one month pursuant to a stipulation of the parties. Greene v. City of Philadelphia, No. 97-4264 (E.D. Pa. Aug. 15, 1997) (order granting parties' stipulation to extend discovery period until December 14, 1997). Now, more than four months later and less than a month before trial, the plaintiff has not shown the court why the information he seeks, such as documents relating to the conditions Mr. Greene experienced while in prison, was not obtainable during the discovery period. Pl.'s Mem. at 4. Furthermore, the plaintiff contends that he seeks more information to undermine the reliability of the statements made by Detective Prendergast and Fuentes. Id. He does not, however, provide any explanation as to what type of information he intends to procure to such an end nor has he even, at this

late date, proffered any such information. Id. [11]

An appropriate order follows.

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[11] The plaintiff has failed to show that Detective Prendergast or Detective Kwisz violated his constitutional rights. Because there is no evidence of an underlying violation, the municipal defendant, the City of Philadelphia, and Police Commissioner Timoney, in his official capacity, are entitled to summary judgment. See, e.g., Marshall v. Abridge, 798 F. Supp. 1187, 1197-98 (W.D. Pa. 1992) (a claim against an individual in his official capacity merges with a claim against the municipality). Furthermore, even if one could find that Detectives Prendergast and Kwisz violated Greene's constitutional rights, Greene has unearthed absolutely no evidence showing that Commissioner Timoney or the City of Philadelphia engaged in a custom or policy adopted by the municipality, a necessary predicate to municipal liability. See Stoneking v. Bradford Area School Dist., 882 F.2d 720, 724-25 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

Likewise, in order to hold Police Commissioner Neal liable, in his individual capacity, the plaintiff must prove that he tolerated misconduct resulting in the violation of Greene's rights. As discussed, no such violation has been shown. Finally, even if Greene's rights had been violated, Commissioner Neal is not liable in his individual capacity because Green has not shown that Commissioner Neal "with deliberate indifference to the consequences, established and maintained a policy, practice or custom" which caused the constitutional harm. Stoneking, 882 F.2d at 725. The mere fact that Commissioner Neal was in a supervisory position is not sufficient to hold him liable for a constitutional violation. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).